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No. 88-746

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

HENRY ADAMS, *et al.*,
Petitioners,

v.

THE BUDD COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether proof that a union breached its duty of fair representation requires evidence of Union bad faith where the Union's actions were based on its reasoned interpretation of the governing contract.

2. Whether application of the six-month statute of limitations for hybrid Section 301/duty of fair representation claims precludes a finding of liability based on alleged violations occurring outside the six-month period.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	8
I. The Seventh Circuit's Ruling That The Union Did Not Breach Its Duty of Fair Representation On The Facts Of This Case Is Not In Conflict With The Decisions Of This Court Or Of Other Courts Of Appeal	8
A. The Result Reached Is Consistent With Supreme Court Precedent	8
B. The Decision Does Not Implicate a Conflict Between The Circuits Concerning Application Of The Duty Of Fair Representation To Arbitrary Union Conduct	12
II. Petitioners' Challenge To The Statute Of Limitation Ruling Of The Seventh Circuit Does Not Raise An Important Question Warranting Grant Of The Petition For Certiorari	20
CONCLUSION	22

TABLE OF AUTHORITIES

Cases	Page
Adams v. Budd Co., 846 F.2d 428 (7th Cir. 1988)	8, 18
Augspurger v. Locomotive Engineers, 510 F.2d 853 (8th Cir. 1975)	16
Bazarte v. United Transportation Union, 429 F.2d 868 (3d Cir. 1970)	16
Camacho v. Ritz-Carlton Water Tower, 786 F.2d 242 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986)	13
Coe v. United Rubber Workers, 571 F.2d 1349 (5th Cir. 1978)	16
Condon v. United Steelworkers Local 2944, 683 F.2d 590 (1st Cir. 1982)	16
Cote v. Eagle Stores, 688 F.2d 32 (7th Cir. 1982), *cert. denied*, 459 U.S. 1218 (1983)	13
De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir. 1970), *cert. denied*, 400 U.S. 877	13, 14, 17
Del Costello v. Teamsters, 462 U.S. 151 (1983)	20
Dill v. Greyhound Corp., 435 F.2d 231, (6th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971)	15
Dober v. Roadway Express, Inc., 707 F.2d 292 (7th Cir. 1983)	13
Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270 (9th Cir. 1983)	13, 14, 17
Ethier v. U.S. Postal Service, 590 F.2d 733 (8th Cir.), *cert. denied*, 444 U.S. 826 (1979)	17
Farmer v. ARA Services, Inc., 660 F.2d 1096 (6th Cir. 1981)	14
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)	8
Foust v. IBEW, 572 F.2d 710 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979)	17
Graf v. Elgin, Joliet & Eastern Railway, 697 F.2d 771 (7th Cir. 1983)	13, 19, 20
Grant v. Burlington Industries, 832 F.2d 76 (7th Cir. 1987)	13
Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972)	14, 15
Harris v. Schwerman Trucking Co., 668 F.2d 1204 (11th Cir. 1982)	17

TABLE OF AUTHORITIES—Continued

Page

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) 10
Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981) 12, 13, 19
Humphrey v. Moore, 375 U.S. 335 (1964) 8, 12
Ray Lewis v. Local Union 100, 750 F.2d 1368 (7th Cir. 1984) 21
NLRB v. Teamsters, Local 282, 740 F.2d 141 (2d Cir. 1984) 16
Medlin v. Boeing Vertol Co., 620 F.2d 957 (3d Cir. 1980) 15, 16
Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984) 21
Moore v. Bechtel Power Corp., 840 F.2d 634 (9th Cir. 1988) 14, 16
Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) 9, 12
Peterson v. Kennedy, 771 F.2d 1244, (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986) 17
Robesky v. Quantas Empire Airways, Ltd., 573 F.2d 1082 (9th Cir. 1978) 17
Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975), *modified* 649 F.2d 1207 (6th Cir. 1981), *cert. denied*, 464 U.S. 982 (1983) ..... *passim*
Smegal v. Gateway Foods of Minneapolis, 763 F.2d 354 (8th Cir. 1985), *cert. denied*, 108 S.Ct. 293 (1987) 15
Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir.) (*en banc*) *cert. denied sub nom, United Steelworkers v. Smith*, 449 U.S. 839 (1980) 16
Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944) 8
Superczynski v. P.T.O. Services, 706 F.2d 200 (7th Cir. 1983) 13
Vaca v. Sipes, 386 U.S. 171 (1967) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

White v. Arco/Polymers, Inc., 720 F.2d 1391 (5th Cir. 1983) 16, 17

Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888 (4th Cir. 1980) 17

Statutes

Labor Management Relations Act, 29 U.S.C. § 185(a) 1, 2

Labor Management Relations Act, 29 U.S.C. § 160(b) 2, 20

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BRIEF IN OPPOSITION

STATUTES INVOLVED

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) provides in relevant part:

> (a) Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties . . .

Section 10(b) of the Labor Management Relations Act, 29 U.S.C. § 160(b) provides in relevant part:

> (b) *Provided* . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . .

STATEMENT OF THE CASE

Petitioners are thirty-one former employees at the Budd Company's manufacturing facility in Gary, Indiana. The Budd Company closed the Gary plant in November, 1982. After the plant closed, Petitioners applied for positions at surviving Budd facilities in Philadelphia and other locations. These applications were filed under various preferential hire provisions of the collective bargaining agreement between Budd and Petitioners' union representatives, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Local 1122. Petitioners' applications were denied by the Budd Company. The UAW declined to pursue grievances on their behalf challenging Budd's refusal to hire them.

On June 17, 1985, Petitioners filed a complaint in federal court under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. The complaint alleged that the Company's refusal to hire them violated the preferential hire provisions of the collective bargaining agreement and that the Union's refusal to grieve the denial of their employment applications violated the Unions' duty of fair representation.

The collective bargaining agreement involved included the 1980 National Agreement between Budd and the UAW, a Local Agreement between Budd and Local 1122, and additional agreements relating to the Gary plant

closing.[1] Document 12 of the 1980 National Agreement enabled a laid-off "seniority employee" to obtain preferential hiring consideration for openings at another Budd facility to which application was properly made. The agreement provided, in relevant part:

> Upon his making application for employment, the company will give preference over other applicants to a seniority employee who is laid off from one of the plants covered by this agreement at another plant covered by this agreement. . . . *Applicants* for employment under the above *must meet all of the local plant's hiring eligibility requirements* . . . [Emphasis supplied]

(Kroger Aff., Ex. A)[2] This language has been contained in Budd-UAW agreements since 1971. (Kroger Aff., Para. 5)

Under this language, laid-off employees were entitled to preferential consideration for employment at other Budd plants, but Budd reserved sole discretion to establish "local plant hiring eligibility requirements" and to reject employees on the basis of these local standards. (Rodgers Aff., Para. 6, UAW MSJ App.) During negotiations for the 1980 agreement, the UAW attempted to strengthen employee preferential hiring rights by in-

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[1] These documents appear as Exhibits 3 and 4 respectively in the appendix of exhibits filed by the Company in the district court with its motion for summary judgment. The National and Local Agreements appear as Exhibits A and B to the UAW's MSJ Appendix.

[2] With their motions for summary judgment in the district court, both the Company and Union filed separately bound appendices of exhibts, deposition excerpts and affidavits. In addition, the Company filed a separately bound affidavit of William M. Kroger with attached exhibits. The references to record material in the remainder of this brief are to these volumes. References to material in the Company's appendix will be "Ex. ——, Budd MSJ App." References to materials in the Union appendix will be "Ex. ——" or "—— Dep." or "—— Aff." "UAW MSJ App." References to the affidavit of William Kroger will be "Kroger Aff. ——."

serting language requiring Budd to accept an application for preferential hiring unless there was just cause for denying the application. (*Id.*, Para. 7). Budd, however, refused to accept the UAW's proposal, and the more discretionary language permitting Budd to establish and enforce local hiring eligibility requirements was retained in the final contract. (*Id.*, Kroger Aff., Para. 6)

In anticipation of the closing of the Gary plant, the Union negotiated a supplemental letter agreement which permitted laid-off Gary employees to obtain employment applications for other Budd facilities from a personnel office to be maintained in Gary for at least a year after the plant closed, to submit applications by mail, and to take pre-employment physical examinations in the Gary area, instead of having to travel to the new facility without any assurance of a job. (Rodgers Dep. 34-35, 325; UAW MSJ App.) The supplemental agreement retained the eligibility requirements of the 1980 National Agreement, by providing for preference for applicants "after it has been determined that they meet all of the local plant hiring eligibility requirements." (Ex. C., UAW MSJ App.) The special application procedures for Gary employees expired by their terms when Budd terminated its personnel activity in the Gary area on August 1, 1984. (Ex. 95, Budd MSJ App.)

Between 1982 and 1984 approximately 550 applications by former Gary employees were submitted for openings at surviving Budd plants. (Kroger Aff., Para. 16) In determining whether each applicant met the local hiring eligibility requirements, Budd considered, where available, the past work record of the applicant. Employees were rejected if their application showed a pattern of absenteeism and lateness, disciplinary actions, or off-the-job accident/disability claims. (*Id.* Para. 17) As a result of this process of evaluation, one hundred sixty (160) employees were hired at other Budd plants. (*Id.* Para. 18)

Petitioners submitted unsuccessful applications for employment between 1982 and 1985. (App. E to Petition for Writ of Certiorari) Unhappy with the results of the application procedure, they formed the "Committee of Former Budd Company Employees" in 1984 to represent them in their claims under the preferential hire agreement. (Williams Dep. 8, 11-12, UAW MSJ App.) Several plaintiffs in their own name or in the name of the Committee wrote to various officials of the International Union protesting Budd's application of the preferential hire provisions and requesting assistance. (Williams Dep. Ex. 2, 3; UAW MSJ App., Ex. 18; Budd MSJ App.) These various complaints and requests were channeled to Tom Rodgers, a UAW International Representative charged with the overall duty of enforcing the UAW-Budd collective bargaining agreement. (Rodgers Dep. 20, UAW MSJ App.)

Rodgers requested information on employees whose names had been supplied to him, including those who had signed letters complaining about Budd's action. As a result of these inquiries, Rodgers learned that these individuals were rejected based on local hiring eligibility requirements because of records of absenteeism, discipline, or off-work disability claims. (Rodgers Aff., Para. 19, UAW MSJ App.) In Rodgers' view, based on his understanding of the preferential hiring agreement, the Company had discretion to reject applications on this basis.[3] (Rodgers Aff., Para. 21) Rodgers communicated

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[3] From 1982 to 1985, the Union requested and/or received information from the Company relating to fourteen of the plaintiffs in this action and another twenty (20) former Gary employees who are not plaintiffs here. (Kroger Aff., Ex. G) As a result of UAW efforts, eleven (11) employees who were initially rejected, were eventually hired. (*Id.*, Para. 22) There is no evidence that the Union refused to confirm the circumstances relating to any employee requesting an inquiry prior to the form letter grievances of April 6, 1985.

the results of his inquiry to the Committee on April 10, 1984. (Rodgers Aff., Ex. 7, UAW MSJ App.)

Following receipt of Rodgers' letter, plaintiffs filed a series of administrative charges against Budd and the UAW. (Williams Dep. Ex. 5, 9; Davis Aff., Ex. 1-24, UAW MSJ App.) These charges and material submitted to support them revealed plaintiffs' interpretation of the Rodgers' letter of April 10, 1984, as an unequivocal refusal to represent them.

On February 22, 1985, Petitioners' counsel wrote the Company, attaching form letters from Petitioners requesting employment under the preferential hiring clause. (Budd MSJ App. Ex. 106-109) By this time, at least fifteen of the plaintiffs had already broken seniority under the terms of the Local Agreement and were not eligible for consideration under the preferential hiring clause. (Para. 68(e), Ex. B, UAW MSJ App.) Moreover, the Gary area personnel office had closed the previous summer, and mailed applications for preferential hire were no longer being accepted. (Kroger Aff., Para. 14)

After the Company's rejection of these applications, plaintiffs wrote the Union in similar form letter fashion on April 6, 1985, stating in all letters that the Union should consider the letter a grievance of the Company's denial of their February 22, 1985 applications. (Rodgers Aff., Exs. 8.1-8.32, UAW MSJ App.)

Rodgers declined to file grievances over the Company's denial of plaintiffs' February 1985 applications because they were both untimely and without merit. (Rodgers Aff., Para. 21, UAW MSJ App.) As Rodgers stated in his affidavit:

> [P]laintiffs had long been aware that their unsatisfactory work records were the basis for the denial. Second, it was also my judgment that the grievances were without merit and that arbitration would have

> been a futile endeavor, in that the National Agreement gave Budd sole discretion to establish local hiring standards. It was my interpertation of the preferential hire provision that an individual's prior work record could legitimately be considered by Budd in its determination of whether the individual met the local eligibility requirements.

This opinion as to the merits of plaintiffs' "grievances" was based on his understanding of the language and bargaining history of the preferential hiring clause. (*Id.*, Paras. 6 and 7).[4]

The Complaint in this case was filed on June 17, 1985. After discovery, the Company and the Union moved for summary judgment. The district court granted these motions, ruling that (1) plaintiffs' claims relating to Company and Union denials between 1982 and 1984 were barred by the six-month statute of limitations applicable to hybrid Section 301/duty of fair representation cases; (2) fifteen plaintiffs failed to establish a claim based on their 1985 applications because by that time their seniority rights had expired, and they had no continuing rights under the preferential hire provisions;[5] and (3) the undisputed evidence showed that the Union had not

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[4] Petitioners assert in their Petition that they filed over 100 grievances. In fact, the chart prepared by plaintiffs and attached to their Petition, indicates that, with very few exceptions, the only grievances each plaintiff claims to have filed are some or all of the six inquiry or demand letters mailed by the Committee to various union representatives on February 29, 1984, March 7, 1984, March 26, 1984, July 10, 1984, February 23, 1985, April 6, 1985. The record shows that the Union did file a grievance for plaintiff L. M. Jackson in 1983 which was denied based on the Company's right to rely on its local hiring standards. (Kroger Aff., Para. 20, Ex. F)

[5] In its motion for summary judgment the Union addressed the claims of only twenty-one of the Petitioners. The remaining ten had been dismissed by the court for repeated failures to answer Union interrogatories. Plaintiffs failed to preserve their objection to this dismissal by proper argument to the Seventh Circuit.

violated its duty of fair representation with respect to the remaining plaintiffs. The Petitioners appealed to the Seventh Circuit, which affirmed the district court decision on all points with a published opinion issued on May 5, 1988. *Adams v. Budd Co.*, 846 F.2d 428 (7th Cir. 1988).

REASONS FOR DENYING THE WRIT

I. The Seventh Circuit's Ruling That The Union Did Not Breach Its Duty Of Fair Representation On The Facts Of This Case Is Not In Conflict With The Decisions Of This Court Or Of Other Courts Of Appeal.

A. The Result Reached Is Consistent With Supreme Court Precedent.

The Court held in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), that a union, as the exclusive bargaining representative of employees, has "a statutory duty fairly to represent all of those employees" in the course of collective bargaining and in enforcement of its collective bargaining agreement through grievance/arbitration procedures. *See also Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953);[6] *Humphrey v. Moore*, 375 U.S. 335 (1964); *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944). The Court described a union's duty as follows:

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with com-

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[6] In *Ford Motor Co. v. Huffman*, the Court noted that a collective bargaining agreement will inevitably affect certain employees or groups of employees differently and that "the complete satisfaction of all who are represented is hardly to be expected." For this reason, a union is afforded a "wide range of reasonableness" in discharging its function as collective bargaining representative subject to "complete good faith and honesty of purpose in the exercise of its discretion." 345 U.S. at 338.

> plete good faith and honesty and to avoid arbitrary conduct.

Vaca v. Sipes, 386 U.S. at 177. The duty of fair representation is breached only where the "union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." *Id.*, at 190.

The *Vaca* decision focused on the requisite proof of a breach of the duty of fair representation in the context of grievance handling. According to the Court, it was not enough to prove that the union failed to pursue a grievance to arbitration or that the grievance was meritorious. Under *Vaca*, a court will not second-guess the union's evaluation of the merits of a grievance absent evidence that the union was "personally hostile" to the grievant or that "the union acted at any time other than in good faith." *Id.*, at 194. A union that can explain its actions based on its good faith evaluation of the merits of a grievance does not breach its duty to the employees it represents.

Since *Vaca*, the Court has not again had occasion to consider whether any specific union conduct violates the duty of fair representation. However, it has characterized and expounded on its holding in *Vaca* in the course of resolving issues in other contexts.

Thus, in *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), a case involving issues of NLRB preemption, the Court distinguished the individual's preempted claim in that case from the judicially cognizable duty of fair representation claim discussed in *Vaca*. The Court concluded that Lockridge had not stated a claim for breach of the duty of fair representation, stating:

> For such a claim to be made out, Lockridge must have proved 'arbitrary or bad faith conduct on the part of the Union.' There must be 'substantial evi-

> dence of fraud, deceitful action or dishonest conduct' [Citations omitted]

403 U.S. at 299. According to the Court, the purpose of judicial enforcement of the duty of fair representation was to assure that "no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers." *Id.*, at 301.

In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), the Court held that the plaintiffs were entitled to relief against the employer from an otherwise final arbitration decision if they proved at trial that the union breached its duty of fair representation in the course of the arbitration proceeding. The Court concluded:

> Petitioners are not entitled to relitigate their discharge merely because they offer newly discovered evidence that the charges against them were false and that in fact they were fired without cause . . . But it is quite another matter to suggest that erroneous arbitration decisions must stand even though the employee's representation by the union has been *dishonest, in bad faith, or discriminatory.* [Emphasis supplied]

424 U.S. at 571. In *Hines* plaintiffs presented an issue for trial under this standard with evidence that the charges against them were false, that they were assured by the union that they were being taken care of, that the union's representation was nevertheless completely perfunctory, and that there existed political antagonism between local union officials and plaintiffs. 424 U.S. at 559 n. 4. Thus the Court noted that the duty of fair representation can be breached not only where the union ignores a meritorious grievance but also where it processes a meritorious grievance "in a perfunctory fashion." *Id.*, at 569.

Petitioners assert that the Seventh Circuit's decision in this case incorrectly applies the precedent of *Vaca*. However, the record makes clear that the real disagree-

ment between Petitioners and the Union concerned their different interpretation of the preferential hire provisions of the collective bargaining agreement. The Union believed that the preferential hire provisions allowed the Company to set its own local hiring eligibility requirements at each of its plants and to deny Petitioners' applications based on whatever requirements they set. The Union determined upon inquiry in each case that the Company was rejecting applicants based on past records of absenteeism, discipline, or off-work disability claims and concluded that this was within the Company's contractual right. Its conclusion was supported by bargaining history which showed that attempts to limit Company discretion in past contract negotiations had failed.

Throughout these proceedings, Petitioners have claimed that the Union erred in allowing the Company to exercise such broad discretion in setting and enforcing the local hiring requirements.[7] Yet it is undisputed on the record that the Union believed in good faith that the contract permitted the Company to exercise that discretion, and it is further undisputed that the Union had no ill will towards Petitioners that would have motivated it to ignore otherwise meritorious claims.

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[7] In opposition to Company and Union motions for summary judgment, Petitioners briefed the issue whether the Company violated the collective bargaining agreement by rejecting their applications for employment. (*See* Plaintiffs' Appendix in the Seventh Circuit, at 548-555.) They contended that the Company breached the Preferential Hire Agreement by (1) relying on old disciplinary records kept in violation of the Local Agreement, (2) by effectively terminating their employment rights without just cause and without advance notice of the rules to be applied, (3) by failing to accord them a real preference over employees outside Budd for whom such complete employment history was not available, and (4) by applying local hiring requirements that were unreasonable and failed to measure their ability to perform available jobs. All of these arguments depend on the degree of discretion accorded the Company under the contract as a matter of contract interpretation and not on evaluation of individual circumstances.

Under *Vaca*, the courts may not second-guess the Union's good faith interpretation of the governing contract, even if they believe the Union's legal judgment is unsound. Because the Union's actions here were based on a reasoned evaluation of contractual language as applied to Petitioners' grievances, and not on improper considerations unrelated to the Union's role as bargaining representative, the actions were neither arbitrary, discriminatory nor in bad faith within the clear holding of *Vaca*. Accordingly, the result reached by the Seventh Circuit in this case is fully supported by existing Supreme Court precedent and raises no substantial issue which requires further elucidation of applicable law by the Court.

B. The Decision Does Not Implicate A Conflict Between The Circuits Concerning Application Of The Duty Of Fair Representation To Arbitrary Union Conduct.

The standard for proof of breach of a union's duty of fair representation in the Seventh Circuit was established in *Hoffman v. Lonza, Inc.*, 658 F.2d 519 (7th Cir. 1981), as follows:

> An action based on a duty to fairly represent cannot be based solely on some action or omission by the union that results in an employee not receiving a "fair" hearing on the merits of a grievance. The legal action based on the union's duty to fairly represent might be more properly labeled as an action for the union intentionally causing harm to an employee involved in a grievance proceeding. The "duty" is not breached and the employee has no remedy without substantial evidence of fraud, deceitful action or dishonest conduct.

658 F.2d at 522, *citing Motor Coach Employees v. Lockridge*, 403 U.S. at 299, and *Humphrey v. Moore*, 375 U.S. at 348 (1964). Subsequent decisions of the Seventh Circuit have affirmed that the "intentional misconduct" test

formulated in *Hoffman* is the controlling standard in that circuit. *Grant v. Burlington Industries*, 832 F.2d 76 (7th Cir. 1987); *Superczynski v. P.T.O. Services*, 706 F.2d 200 (7th Cir. 1983); *Dober v. Roadway Express, Inc.*, 707 F.2d 292 (7th Cir. 1983); *Graf v. Elgin, Joliet & Eastern Railway*, 697 F.2d 771 (7th Cir. 1983); *Cote v. Eagle Stores*, 688 F.2d 32 (7th Cir. 1982), *cert. denied*, 459 U.S. 1218 (1983). In *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986), the court stated that intentional misconduct is:

> sabotaging a possibly meritorious grievance . . . because the worker is on the outs with the union or is a member of some racial or other minority or is not a union man.

Id. at 243. The intentional misconduct standard was applied by the Seventh Circuit in this case in ruling that the Union did not breach its duty of fair representation.

Petitioners contend that the Seventh Circuit's intentional misconduct standard applied in this case conflicts with decisions in other circuits which hold that unintentional failure to process a meritorious grievance can breach a union's duty of fair representation. Petitioners primarily rely on *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983); *Ruzicka v. General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975), *modified* 649 F.2d 1207 (6th Cir. 1981), *cert. denied*, 464 U.S. 982 (1983); and *De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir. 1970), *cert. denied*, 400 U.S. 877.

What Petitioners ignore is that the cases where courts have found a breach of the duty of fair representation for unintentional union conduct are of a different type than this case. The instant case is one in which the Union based its actions on its reasoned interpretation of the relevant contract provisions. Courts which have con-

sidered the issue agree that evidence of bad faith is required to prove a breach of the union's duty in these circumstances. *See Moore v. Bechtel Power Corp.*, 840 F.2d 634, 636 (9th Cir. 1988). The cases on which Petitioners rely are not cases in which the union's reasoned evaluation of the merits of a grievance was at issue. Instead, those cases involved a union's failure to act, usually by failing to perform a ministerial function. Moreover, in those cases, the union's failure to act constituted a breach of the duty of fair representation because the failure was either unexplained, unsupported by any rational basis or otherwise inexcusable. Thus, to the extent that the Seventh Circuit's standard is different than the standards of other courts, the difference in standards is not implicated in this case.

A review of the cases on which Petitioners rely makes this clear. In *Dutrisac*, the union failed to appeal plaintiff's grievance to arbitration on time. The union was held liable "for a total failure to act that is unexplained and unexcused." 749 F.2d at 1273. In *De Arroyo*, the union made no investigation or determination as to the merits of plaintiffs' grievances and offered no rational explanation for its failure to press them. In finding that the union breached its duty, the court noted that the union's defense might be well taken if there were "any rational basis" for its actions. 425 F.2d at 284 n.4. In *Ruzicka I*, the union's failure to meet an appeal deadline was found to state a claim for breach of the union's duty. However, in *Ruzicka II*, the Sixth Circuit modified its earlier ruling and held that if the failure could be explained, as by reliance on a past practice of flexible deadlines, no breach of the duty occurred. 649 F.2d at 1211.[8] Only "unexplained union inaction which substan-

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[8] Petitioners also cite *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981), and *Griffin v. UAW*, 469 F.2d 181 (4th Cir. 1972). In *Farmer*, the court, in connection with findings of pervasive sex discrimination in the negotiation and implementation of

tially prejudices a member's grievance" can violate the union's duty. *Id.*; *see also Smegal v. Gateway Foods of Minneapolis, Inc.*, 763 F.2d 354, 359 (8th Cir. 1985), *cert. denied*, 108 S.Ct. 293 (1987) (ignoring clearly meritorious grievance without explanation is ground for breach of duty).

These cases do not involve allegations against a union that has acted based on its reasoned interpretation of contractual language. The Sixth Circuit explicitly recognized in *Ruzicka II* that the arbitrary conduct standards developed in the two *Ruzicka* decisions do not apply to cases where the union's reasoned judgment on the merits of a grievance was at issue. In fact, the court reaffirmed its holding in earlier cases that proof of bad faith is required to support a claim for unfair representation "where the union in question had made a decision that the individual's grievance was without merit." 649 F.2d at 1212, *citing Dill v. Greyhound Corp.*, 435 F.2d 231, 238 (6th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971).

Those circuits that have addressed the issue agree with the Sixth Circuit that where the union has made a reasoned judgment based on its interpretation of the contract, the judgment will not be overturned absent evidence of bad faith. *Medlin v. Boeing Vertol Co.*, 620 F.2d 957,

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sex-segregated classifications, held that the union violated its duty to fairly represent women employees who unsuccessfully attempted to move into the male dominated classifications. In *Griffin*, the court held that the union breached its duty by inexplicably filing plaintiff's grievance with the very supervisor plaintiff had been terminated for assaulting, where there was evidence that "the Union's handling of the grievance [was] motivated by bad faith" based on the bargaining chairman's personal friendship with the supervisor. 469 F.2d at 185. Although these cases refer to a right of action based on arbitrary conduct without evidence of bad faith, they both involve bad faith and/or discriminatory conduct which could support a finding of breach of the duty under any circuit's standards.

961 (3d Cir. 1980); *Bazarte v. United Transportation Union*, 429 F.2d 868, 872 (3d Cir. 1970); *White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1397 (5th Cir. 1983); *Coe v. United Rubber Workers*, 571 F.2d 1349, 1350 (5th Cir. 1978); *Augspurger v. Locomotive Engineers*, 510 F.2d 853, 859 (8th Cir. 1975); *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1245 n.9 (8th Cir.) (*en banc*) *cert. denied sub nom. United Steelworkers v. Smith*, 449 U.S. 839 (1980); *Moore v. Bechtel Power Corp.*, 840 F.2d 634, 636 (9th Cir. 1988).

The standard of review recently articulated by the Ninth Circuit in *Moore v. Bechtel Power Corp.* harmonizes the decisions of that circuit and others by recognizing a distinction between ministerial errors and errors of judgment. As the court stated:

> In our application of this doctrine, we ask first whether the act in question involved the union's judgment, or whether it was procedural or ministerial. If it is a union's judgment that is in question, . . ., the plaintiff may prevail only if the union's conduct was discriminatory or in bad faith. Arbitrariness alone would not be enough. Only when the challenged conduct was procedural or ministerial does arbitrariness become controlling. [Citations omitted]

840 F.2d at 636. Moreover, arbitrariness does not mean negligence but rather "reckless disregard" of employee rights.[9] Finally, the court noted that in all its cases find-

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[9] All circuits require more than negligence or poor judgment to prove a breach of the union's duty. *Condon v. United Steelworkers Local 2944*, 683 F.2d 590, 594 (1st Cir. 1982), ("negligence does not constitute a breach" and "arbitrary or discriminatory treatment" requires proof that union's conduct was "intentional, invidious, and directed at" plaintiff); *NLRB v. Teamsters, Local 282*, 740 F.2d 141, 147 (2d Cir. 1984) (requires proof of union omissions that are "so egregious, so far short of minimum standards of fairness . . . and so unrelated to legitimate union objectives as to be arbitrary"); *Medlin v. Boeing Vertol Co.*, 620 F.2d 957, 961 (3d

ing a breach of duty based on arbitrary conduct it had found

> that the union failed to perform a procedural or ministerial act, that the act in question did not require the exercise of judgment, and that there was no rational and proper basis for the union's conduct.

Id. Citing Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986).

This formulation of the standard for review of duty of fair representation cases harmonizes the decisions in *De Arroyo*, *Ruzicka I* and *Dutrisac*, on which Petitioners rely, with the result reached by the Seventh Circuit in this case. Unlike the cases relied on by Petitioners, this case does not involve an unexplained failure to act by the Union, but rather turns on an exercise of judgment concerning the merits of Petitioners' grievances based on its reasoned interpretation of the contract.

The Seventh Circuit expressly rejected petitioners' claim that the record supports a finding that the Union

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Cir. 1980) (bad faith required); *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980) (union actions must be "so indifferent to member's rights," "so grossly deficient" as to rise to "culpability"); *White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1397 (5th Cir. 1983) (bad faith required); *Ruzicka II*, 649 F.2d at 1212 (Sixth Circuit requires "reckless disregard"); *Ethier v. U.S. Postal Service*, 590 F.2d 733 (8th Cir.), *cert. denied*, 444 U.S. 826 (1979) ("inexplicable" union conduct may violate its duty); *Robesky v. Quantas Empire Airways, Ltd.*, 573 F.2d 1082 (9th Cir. 1978) ("egregious" conduct required); *Foust v. IBEW*, 572 F.2d 710 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979) (approved jury instruction requiring "gross nonfeasance" and "hostile discrimination in arbitrarily and capriciously" refusing to file timely grievance); *Harris v. Schwerman Trucking Co.*, 668 F.2d 1204, 1207 (11th Cir. 1982) ("reckless disregard" of employee rights or "grossly deficient" union conduct required). Any deficiencies in the Union's conduct in this case, even if not based on matters of judgment, do not rise to the level of egregious or reckless conduct required by the circuits.

"deliberately and unjustifiably failed to represent" them. As the Court found, the record shows:

> that Rodgers refused to pursue plaintiffs' 1984 grievance request because he believed the union had no sound basis for submitting grievances in view of the restrictive language in the preferential hire agreement that gave Budd sole discretion to establish 'local plant hiring eligibility requirements' and to reject employees on the basis of these local standards; and that Rodgers sat on plaintiffs' 1985 grievance request because he had investigated plaintiffs' identical claims of contractual violations a year earlier and found that, given the language of the preferential hire agreements, they were without support.

836 F.2d at 433. Thus, the Union's actions were dictated by its reasoned interpretation of the preferential hire provisions in the contract. Under the Union's interpretation, the Company had unlimited discretion to establish local hiring eligibility requirements and to exclude any employee who did not meet those requirements. This interpretation was consistent with the language of the agreement and with recent bargaining history. Given this interpretation of the contract, the Union reasonably concluded that it had no basis for challenging hiring decisions by the Company reached through application of its discretionary hiring requirements. Accordingly, the court found, and the record showed, that the Union's actions were based on an evaluation of the merits of plaintiffs' grievances consistent with its reasoned interpretation of contractual language.[10]

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[10] As the court found, the record in this case was devoid of any evidence of bad faith or hostility toward any plaintiff. While the court noted that the record established that Rodgers in evaluating Petitioners' grievances did not independently verify the information supplied by the Company, this failure amounted *at most* to "inferior representation." The record did not disclose any reason for Rodgers to question the Company's records nor did any Petitioner present evidence that the records were erroneous. Thus, Petitioners have never made clear what a more thorough investigation could

To the extent the Seventh Circuit has departed from other circuits in its review of duty of fair representation cases, the departure involves cases where the union fails to perform a ministerial act. *See Hoffman v. Lonza*, 658 F.2d at 521; *Graf v. Elgin, Joliet & Eastern Ry. Co.*, 697 F.2d at 779. Unlike other circuits, the Seventh Circuit will not even consider a finding of breach of the duty where union conduct is unintentional. However, the split on this issue applies only to a "narrow range of cases" involving "unexplained union inaction." *Ruzicka II*, 649 F.2d at 1211. This is not such a case.

Moreover, the circuits are in accord that something more than negligence is required, and those that recognize unintentional breaches require irrational conduct or reckless disregard for employee rights. The Seventh Circuit, in this case, suggests that some form of irrational conduct might support a finding of breach of the union's duty within the Seventh Circuit's standard, but that a finding of irrational conduct is not supported by the record here. Thus, the court observes in a footnote to its decision:

> Where a contract guarantees representation, an egregious and flat out refusal to represent has the effect of cancelling the contractual guarantee. *Hoffman* does not (and could not consistent with congressional policy) bar review of an egregious failure to represent contractual rights. Such a failure is neither alleged here nor disclosed by the record.

Slip Op. at 11 n.2. In an earlier case, the Seventh Circuit further suggested that in a proper case "reckless" conduct

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have revealed that would have altered the Union's evaluation of their grievances in view of the Union's interpretation of the contract as affording the Company an unfettered right to reject employees for preferential hire by application of its own local hiring requirements. Accordingly, this case does not fall within the class of cases where an unexplained failure to investigate evidenced a breach of the union's duty. Here the scope of investigation afforded plaintiffs was consistent with the scope of the rights conferred by the contract as construed by the Union.

could be sufficient to support an inference of bad faith and a finding that a union breached its duty. *Graf v. Elgin, Joliet & Eastern Ry.*, 697 F.2d at 778. It appears, then, that the difference in the Seventh Circuit's approach may not lead to different results from those of other circuits were the court presented with a clear case of an irrational or unexplained failure to act by the union which severely prejudiced an employee's contractual rights.

The petition for *certiorari* should be denied because the result reached by the Seventh Circuit in this case does not conflict with the decisions of other circuits. The Union's decision not to pursue Petitioners' grievances was based on a good faith reasoned interpretation of the governing contractual provisions. Accordingly, it does not violate the Union's duty of fair representation under this Court's decision in *Vaca v. Sipes* or under decisions in other circuits applying Supreme Court precedent. To the extent the circuits are split, the disagreement concerns liability for unintentional conduct involving an unexplained failure to act. The facts of this case do not present a situation which implicates this disagreement.

II. Petitioners' Challenge To The Statute Of Limitations Ruling Of The Seventh Circuit Does Not Raise An Important Question Warranting Grant Of The Petition For Certiorari.

The statute of limitations for hybrid breach of contract duty of fair representation actions is the six-month limitations period in § 10(b) of the Labor Management Relations Act, 29 U.S.C. § 160(b). *Del Costello v. Teamsters*, 462 U.S. 151 (1983). Under this authority, the Seventh Circuit held that Petitioners' claims relating to applications and requests for grievances made in 1983 and 1984, more than six months before their complaint was filed, were barred by the applicable statute of limitations. The court further held that only Petitioners' 1985 applications and related grievances could be considered

in deciding whether the employer violated the contract and the union breached its duty of fair representation.

In rejecting Petitioners' 1983 and 1984 claims as time-barred, the court relied on its decisions in *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984) and *Ray Lewis v. Local Union 100*, 750 F.2d 1368 (7th Cir. 1984). *Metz* held that "continued union inactivity after an initial failure to respond to a grievance request does not violate the duty of fair representation." (846 F.2d at 433) *Lewis* held that, even if a violation is continuing, "only complaints based upon conduct occurring within the six-month period preceding the filing of the complaint are timely." (*Id.*)

Petitioners' challenge to this part of the court's decision is based on their disagreement with the Seventh Circuit's interpretation of its own precedent and on its application of circuit precedent to the facts of this case. Petitioners do not suggest that the Seventh Circuit's decision on this issue conflicts with any decision of the Supreme Court or of another court of appeals. The decision merely applies circuit precedent to a particular fact situation. There is no important question of federal law implicated in the court's application of the statute of limitations in this case which warrants the exercise of the Court's jurisdiction on a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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